TABLE OF CONTENTS

PAGE

I. HISTORY OF THE CASE 1–7

II. BRIEF STATEMENT OF FACTS 7–11

1. Reference in the Commission's order to petitioner's *right to operate* over respondent's tracks in consideration of its payment of $15,000 a year. (p. 8.)
2. Certificate of abandonment issued by Interstate Commerce Commission. (p. 8.)
3. Written notice by petitioner to respondent that it would cease further operation. (p. 9.)
4. State Court's interpretation of contract sued upon. (p. 9.)
   (a) Not terminable at will. (p. 10.)
   (b) Annual payment was to be made irrespective of use. It was consideration paid for the right to use and not for the use. (p. 10.)

III. BRIEF OF THE ARGUMENT 12–49

A.

The State Court had jurisdiction of the subject matter of the Case 12–19

(a) Consideration of federal Statutes relative to the Interstate Commerce Act as amended by the Transportation Act of February 28, 1920. (p. 12.)
(b) Section 22 has not been abrogated or modified but preserves all existing rights not inconsistent with those created by the Statute. (p. 15.)
(c) The action in this case lay in the State Court because it was brought to enforce common law rights. (p. 16.)
(d) The respondent made no attack open or covert upon any regulation or order of the Commission relative to its certificate of abandonment. (p. 19.)
(e) The State Court had jurisdiction to construe the order of the Interstate Commerce Commission. (p. 19.)

B. PAGE

The Amended Interstate Commerce Act and Certificate and Order of the Commission issued thereunder do not protect the petitioner in this action 20-37

I. (a) Provisions of Transportation Act relative to abandonment show no Congressional purpose to relieve railroads from their obligations to their creditors or to take from the latter any remedial process provided by the laws of the state. (p. 20.)

(b) Congress did not empower Interstate Commerce Commission to take away a creditor's rights when it exercises its administrative judgment relative to abandonment. (p. 22.)

(c) Commission has no power under Section 20 to determine in its administrative discretion that public convenience and necessity require the abrogation of contracts. (p. 24.)

(d) If Congress had intended to empower the Commission to destroy contract rights it would have used clear language to that effect. (p. 24.)

(e) If assumption of State Court that Congress authorized the Commission to sanction the abandonment by an interstate carrier of contractual obligations is correct then the conclusion of State Court that Commission did not exercise such authority in the instant case, is sound. (p. 25.)

II. Provisions of Transportation Act relative to abandonment show no Congressional purpose that the Commission's order should by force of the federal statutes relieve the railroad from its obligations to creditors. (pp. 25-36.)

(a) Vice of petitioner's reasoning lies in the fact that it is imputing to Congress an intention which is not reasonably implied. (p. 28.)

(b) When abandonment takes place pursuant to the Commission's order the burden upon interstate commerce which Congress had in mind has been removed. Congress did not concern itself with

PAGE

the legal rights of parties who might be affected by the abandonment. (p. 28.)

(*c*) Obligations arising out of mortgages, leases, trackage contracts, and claims for personal services all must be treated alike in the case of abandonment under the Act. (p. 29.)

(*d*) It appears from petitioner's admissions that its contention includes such burdensome obligations as mortgages. (p. 30.)

(*e*) It would be futile to pretend that Congress under the Interstate Commerce Act intended a rich and powerful carrier who chose to abandon a part of its road to be relieved of its obligations. (p. 34.)

(*f*) In consequence of so many problematical matters it is indisputable that Congress had no intention of permitting an abandoning road to escape its contractual obligations. (p. 34.)

III. There is no useful analogy between this case and the rate cases and others upon which the petitioner places so much reliance. (pp. 36–37.)

C.

The agreement of October 25, 1899, between the petitioner and the respondent is a trackage contract for a stated period, which is not terminable at will, and under its terms the annual payments, which were in consideration of the right to use the trackage facilities of the respondent, were to be made irrespective of the petitioner's use thereof, and such payments were not excused by the petitioner's voluntary conduct in obtaining permission to abandon a part of its line the operation of which was necessary to the continued use of the trackage facilities of the respondent (Respondent's original brief, pp. 31–33) 38–49

(*a*) The agreement is a trackage agreement not terminable at the will of either party. (p. 38.)

(*b*) The State Court properly ruled that the agreement "indicates that the annual payment was to be made irrespective of use. It was consideration

PAGE

paid for the right to use and not for the use, . . ." (p. 44.)

(c) When the contract was executed October 25, 1899, by its terms the Boston and Albany Railroad Company gave to petitioner the right to use its tracks until August 30, 1940. (p. 44.)

(d) The consideration was for the right to use and not for the use. If the petitioner did not see fit to avail itself of its right or voluntarily placed itself in a position where such right would be unavailable, nevertheless its obligation to make the payments is unaffected thereby. (p. 44.)

(e) Vested rights took place when the bargain was made. The subsequent conduct of petitioner in applying for permission to abandon, cannot prevent a recovery of what was stipulated upon October 25, 1899. (p. 44.)

(f) The Court is not concerned in this case with a situation where performance of a contract has been rendered impossible by an act of Congress passed after the contract was made. (p. 45.)

(g) Impossibility arising from the promisor's own act is not in any case an excuse for non-performance of his contract. (p. 46.)

(h) When this contract was made, possibility of abandonment was foreseeable and parties could have made provisions for a dispensation respecting payments. (p. 47.)

(i) Inasmuch as petitioner by its own voluntary conduct was responsible for changed conditions the English doctrine that frustration of the commercial adventure brings the contract to an end, is wholly inapplicable. (p. 48.)

(j) In the instant case impossibility of performance is not the result of any prohibitory regulation upon the part of the Interstate Commerce Commission but is solely due, if at all, to the voluntary act of the petitioner in applying to that body for permission to discontinue a part of its road. (p. 49.)

APPENDIX 50

TABLE OF CASES

PAGE

10 A. L. R. 1110 43
Abandonment of Branch Line by N. Y., N. H. & H. R.R., 82 I. C. C. 45 29
Alabama & Vicksburg Ry. Co. v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244 26
American Towing, etc. Co. v. *Baker Whitely Coal Co.*, 117 Md. 660 48
Anzalone v. *Metropolitan Comm.*, 257 Mass. 32, 37 . . . 23
Arkansas Comm. v. *Chicago, etc., R.R.*, 274 U. S. 597, 603 . . 19
Armour & Co. v. *Dallas*, 225 U. S. 280, 286 37
B. & W. Taxi Co. v. *B. & Y. Taxi Co.*, 276 U. S. 535 . . 39
Beasley v. *Texas & Pac. Ry. Co.*, 191 U. S. 492, 496, 497 . . 37
Board of Hudson River Reg. Dist. v. *Fonda*, 249 N. Y. 445 . . 35
Boston v. *Turner*, 201 Mass., 190, 193 35
Carnegie Steel Co. v. *U. S.*, 240 U. S. 156, 164, 165 . . . 48
Central v. *Hereford Rlwy.*, 99 I. C. C. 7 29
Central Trust Co. v. *Chicago Auditorium Co.*, 240 U. S. 581 . 47
City of Montpelier v. *National Surety Co.*, 97 Vt. 111 . . . 47
Cleveland, etc., Rlwy. v. *U. S.*, 275 U. S. 404, 408 26
Colorado v. *United States*, 271 U. S. 153, 166 . . . . 21, 27
Columbus Rlwy. & Power Co. v. *Columbus*, 249 U. S. 399, 412 . 48
Comm. v. *Maletsky*, 203 Mass. 241, 248 23
Davis v. *C. C. C. & St. L. Ry.*, 217 U. S. 157 36
Day v. *U. S.*, 245 U. S. 159 48
Eastern R. R. Co. of New Mexico v. *Littlefield*, 237 U. S. 140, 143 17, 18
Elliott on Railroads (3rd ed.) 750 42
Erie R.R. v. *Public Utility Comms.*, 254 U. S. 394 . . . 35
Franklin Tel. Co. v. *Harrison*, 145 U. S. 459 43
Great Northern Railroad v. *Merchants Elevator Co.*, 259 U. S. 285, 295 . . . . . 18, 19
Great Northern Rlwy. Co. v. *Manchester Sheffield, etc., Rlwy. Co.*, 5 De Gex & Sm. 138 42
Grimsdick v. *Sweetman*, King's Bench Div. (1909) 2 p. 740 . 46
Halsey v. *Lowenfeld*, King's Bench Div. (1916) 2 p. 707 . . 46
Hartman, Procedure & Proof before the Interstate Commerce Commission (1925) 18
37 Harvard Law Review, p. 49, 81-88, 741 . . . . . 23, 39
40 Harvard Law Review, p. 305 48
Inchbald v. *Western Coffee Plantation Co.*, 17 C. B. N. S. 733. . 47
Interstate Commerce Commission v. *Railway Co.*, 167 U. S. 495, 501, 505 24
Isaac M'Lean Sons Co. v. *William S. Butler & Co.*, 227 Fed. Rep. 325 47
Joy v. *St. Louis*, 138 U. S. 1 42
King v. *David Allen & Sons Bill Posting Ltd.*, App. Cases (1916) 2, p. 54 . . . . . 42, 43

PAGE

Laws of England (Earl of Halsbury), Vol. 7, p. 432 . . . 46
Lehigh Valley R. Co. v. *Board of Pub. Util. Comms.*, 49 Supr. Ct. 69 (1928) . . . 35
Lewis v. *Atlas Mutual Life Ins. Co.*, 61 Mo. 534 . . . 47
Llanery Ry. & Dock Co. v. *London & N. W. Ry. Co.*, L. R. 8 Ch. App. 942 . . . 42
L. & N. Railroad Co. v. *F. W. Cook Brewing Co.*, 223 U. S. 70 . . . 18
L. & N. Railroad Co. v. *Johnson, admx.*, 207 Ky. 813 . . . 37
L. & N. Railroad Co. v. *Letcher County C. & I. Co.*, 243 S. W. 45 . . . 37
L. & N. Railroad Co. v. *Mottley*, 219 U. S. 467 . . . 37
Marshall v. *Gordon*, 243 U. S. 521 . . . 24
M'Kell v. *Chesapeake & O. Ry. Co.*, 175 Fed. 321 . . . 41
New York Central & Hudson River R.R. Co. v. *Gray*, 239 U. S. 583 . . . 18, 19, 37
Ortega Co. v. *Triay*, 260 U. S. 103 . . . 37
Osborne v. *Nicholson*, 13 Wall. 654 . . . 45
Penna. R.R. v. *Puritan Coal Co.*, 237 U. S. 129, 130 . . . 15, 18, 22
Penna. R.R. v. *Sonman Coal Co.*, 242 U. S. 120 . . . 16
Proctor v. *Union Coal Co.*, 243 Mass. 428, 432 . . . 46
Railroad Commissioner of California v. *Southern Pacific Co.*, 264 U. S. 331 . . . 26
Railroad Commissioners of Texas v. *Eastern Texas R.R.*, 264 U. S. 79 . . . 39
Railroad Commission of Wisconsin v. *Chicago & Burlington & Quincy R.R. Co.*, 257 U. S. 563 . . . 26
Re Companies' Acts, 117 Law Times 60 (Eng. Ch. D.) . . . 47
Rowe v. *Peabody*, 207 Mass. 226, 232 . . . 48
R. H. White Co. v. *Remick & Co.*, 198 Mass. 41 . . . 43
Shafer v. *Farmers Grain Co.*, (1925) 268 U. S. 189, 199 . . . 35
Sim v. *Edenborn*, 242 U. S. 131, 135 . . . 39
Stanton v. *N. Y. & Eastern R.R. Co.*, 59 Conn. 272, 287 . . . 47
State v. *Atlantic Coast Line R. Co.*, 116 So. 48 . . . 17, 27
Texas & Pacific R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 . . . 18
Texas & Pacific R. Co. v. *Gulf, etc. Rlwy.*, 270 U. S. 266, 373 . . . 17, 19, 21, 26, 49
Texas & Pacific R. Co. v. *Louisiana Pub. Serv. Comm.*, 12 F. (2nd) 708 . . . 43
The Chicago Junction Case, 264 U. S. 258 . . . 26
Timkin Co. v. *Penn. R.R. Co.*, 274 U. S. 181 . . . 19
United Merchants R. I. Co. v. *American B. Co.*, 128 N. Y. Supp. 666 . . . 43
Union Pacific Rlwy. Co. v. *Chicago, etc., Rlwy. Co.*, 163 U. S. 564 . . . 41, 42
United States v. *Gleason*, 175 U. S. 588, 602 . . . 48
United States v. *Louis. & Nash. R.R.*, 235 U. S. 314, 320 . . . 22
Vanderblue and Burgess (123) . . . 20
Western Union Telegraph Co. v. *G. R. & Banking Company*, 227 Fed. 276 . . . 43
Williston, Contracts (1920) Sec. 1960 . . . 47
Yick Wo v. *Hopkins*, 118 U. S. 356, 330 . . . 23

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 532.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
Petitioner,

v.

BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF NEW YORK CENTRAL RAILROAD COMPANY, *Assignee, Respondent.*

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.*

I.

HISTORY OF THE CASE.

The respondent commenced an action in the Superior Court for Suffolk County, Commonwealth of Massachusetts, against petitioner to recover damages because of the breach of a written contract executed on or about October 25, 1899.

In substance the first section of the contract provided that whereas the defendant petitioner herein in pursuance of a previous agreement between the parties and others dated May 9, 1898 was then constructing and would shortly complete the branch railroad from Tariffville, Connecticut, to a point at or near West Springfield, Massachusetts, to connect with

*This supplemental brief is in amplification of the brief filed by the respondent in opposition to the petition for certiorari and reference will be made to the same in discussing the questions of law presented to the court. The court is respectfully requested to consider the former brief in connection with this.

the lines of the plaintiff, from and after the opening of the branch line for the passage of regular trains until the 30th day of August, 1940, the Boston & Albany Railroad was to license and permit, subject to certain conditions therein set forth, the defendant and its successors to pass with its trains and locomotives over its lines between the point of connection west of the Connecticut River and the yard and engine houses of the Boston & Albany Railroad Company at West Springfield in each direction, and to license and permit passenger trains to cross the bridge over the Connecticut River into the Union Station at Springfield, with the right to use in connection with such trains all water stations and other facilities necessary for the accommodation of such trains and the traffic to be transported by them, the defendant paying to the plaintiff therefor fifteen thousand dollars ($15,000) per annum in equal quarterly payments on the first days of January, April, July and October of each year, the first payment to be made upon the first quarterly period next succeeding the opening of said branch line for the passage of regular trains.

The contract further provided in substance that, if the daily average number of trains should exceed three freight trains of not more than thirty cars in each train in each direction and three passenger trains in each direction, the price to be paid should be increased in the proportion in which the increased number of trains exceeded the number of trains provided for and that that amount was to be computed once in six months during the term of the contract and payment to be made accordingly.

The first paragraph of the body of the contract also provided that if the defendant should take water from any water stations of the Albany company it should share in the expense of maintaining such stations; that the defendant should pay $1 per day for stalls used in the plaintiff's engine house and that the defendant should be permitted to erect a coal platform or trestle at some convenient point.

The second paragraph of the body of the contract provided that the Albany company should transfer freight cars brought

by the defendant to the West Springfield yard to a connection with the Boston & Maine or the New York, New Haven & Hartford railroad companies' lines in Springfield for the rate of $2 a car; that the Albany company should move such freight so brought by the defendant designed for points in Springfield for the rate of 30 cents a ton except coal on which the rate was to be 50 cents a ton and that for such freight as was required to pass through the freight house of the Albany company the rate to be charged should be 50 cents per ton and in addition a proportional charge for labor.

The third paragraph of the body of the contract provided that the Albany company for passenger business shall sell tickets, handle baggage and take care of passenger trains in its passenger yard and transfer through passenger cars to connecting lines.

The fourth paragraph of the body of the contract provided that the defendant should build and maintain an interlocking tower at the junction of its road with that of the plaintiff.

The fifth paragraph of the contract dealt with the ascertainment and apportionment of responsibility between the parties in case of accident or loss.

The sixth paragraph of the contract provided that the defendant and its successors should make the payments by this contract in accordance with the terms thereof.

The seventh and last paragraph of the body of the contract provided that the defendant should make no transfer of the contract rights without the consent of the Albany company and that in case of breach by the defendant or its successors continuing for thirty days or in case the contract rights should be taken from the defendant or its successors by process of law by bankruptcy, insolvency, receivership or otherwise the Albany company or its successors might at any time terminate this contract and all rights acquired thereunder by the defendant.

The defendant's substitute answer denies each and every allegation in the plaintiff's "writ and declaration contained. And for further answer to the plaintiff's declaration the de-

fendant says that the alleged contract attached to the plaintiff's declaration as Exhibit 'A' was signed in pursuance of a previous agreement dated May 9, 1898, between the Boston & Albany Railroad Company, the Hartford & Connecticut Western Railroad Company, and the Philadelphia, Reading and New England Railroad Company and its Reorganization Committee, by the terms of which the defendant, Central New England Railway Company, was to be organized to enter into said Exhibit 'A'; that, after the making of the contract alleged in the plaintiff's declaration both by the action of the plaintiff and the Boston & Albany Railroad Company, jointly and severally, and also because of other circumstances not within the possible contemplation of the parties thereto at the time of the making of said agreement, the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant was rendered illegal, impossible, and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts. And for further answer to the plaintiff's declaration the defendant says that on September 8, 1921, in accordance with paragraphs 18 and 19 of Section 1 of the Interstate Commerce Act (41 U. S. Statutes at Large 474) a certificate of public convenience and necessity was issued to the defendant by the Interstate Commerce Commission, a copy of which is marked Exhibit 'B' and made a part of this answer; that in pursuance of and in reliance on this certificate the defendant abandoned its line of railroad extending from Feeding Hills in the Town of Agawam, County of Hampden, Massachusetts, to its connection with the Boston & Albany Railroad, and ceased the operation of trains over this line into the City of Springfield, Massachusetts, by way of the plaintiff's tracks as provided in Exhibit 'A'* of the plaintiff's declaration."

After a trial and verdict for the plaintiff (respondent

*Vide: Record pp. 34, 35, 36 "Original Exhibits."

herein) in the Superior Court, the case came before the Supreme Judicial Court for the Commonwealth on two substitute bills of exceptions, one of the plaintiff, and the other of the defendant (petitioner herein). The bill of exceptions for the plaintiff was addressed mainly to rulings of the presiding judge on the measure of damages and as to the burden of proof upon the issue of the amount of damages. The exceptions of the defendant related (1) to the refusal of the presiding judge to grant its motions to dismiss the action in substance because as it is alleged the federal statutes have given to the federal courts exclusive jurisdiction of the subject of this case; (2) to the refusal of the presiding judge to grant its motion for a directed verdict; (3) to the admissibility or rejection of testimony, and (4) to the granting of certain requested rulings of the plaintiff and to the refusal to give certain requests for rulings made by the defendant.

The state court overruled defendant's exceptions and those of the plaintiff. The opinion will be found at page 59 of the record. The defendant subsequently filed a petition for writ of certiorari wherein it alleged that the judgment of the state court is erroneous and should be reviewed by this court for the following reasons:

1. Because the judgment and opinion of the Supreme Judicial Court dismissing your petitioner's exceptions fail to recognize the validity as a defense to the action of the certificate and order of the Interstate Commerce Commission, issued, in the proceeding numbered 1749 on its finance docket, under paragraphs 18 to 22 of section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 U. S. Stats. at Large 474).

2. Because the judgment as affirmed by the decision dismissing your petitioner's exceptions denies entirely to your petitioner the right, claimed by it under the amended Interstate Commerce Act (41 U. S. Stats. at Large 474) as applied, to cease operation and further payments under the contract sued on with impunity.

3. Because the judgment as affirmed by the decision dismis-

sing your petitioner's exceptions denies to your petitioner the validity of the amended Interstate Commerce Act (41 U. S. Stats. 474) as a defense to an action for damages arising from action covered by a certificate and order issued by the Interstate Commerce Commission.

4. Because the judgment as shown by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions proceeds on the theory that the certificate and order of the Interstate Commerce Commission is invalid as a defense to the action because the Commission did not affirmatively intend to abrogate the obligation on which suit was brought, whereas the effect on private contracts of orders issued by the Commission under paragraphs 18 to 22 of section 1 of the amended Act is a question depending, not upon the Commission's intention as to the particular contract, but upon the legal interpretation of the Act of Congress.

5. Because the judgment as shown by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions proceeds on the theory that the certificate and order of the Interstate Commerce Commission is invalid as a defense to the action, on the ground that the Commission did not affirmatively intend to abrogate the obligation sued on, whereas the Commission has properly pointed out (131 I. C. C. 421) that it has no power under paragraphs 18 to 22 of section 1 of the amended Interstate Commerce Act to authorize, as such, the abrogation of contract obligations.

6. Because the judgment, as shown by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions, relies upon the alleged fact that the Interstate Commerce Commission did not intend to adjudicate that the annual $15,000 payment was an operating charge of your petitioner, whereas the accounting nature of said annual payments is immaterial on the question as to the legal effect of the action of Congress and the Interstate Commerce Commission and said annual payments were properly operating charges of your petitioner and have been so adjudicated by the Interstate Commerce Commission.

7. Because the judgment as affirmed by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions renders ineffective Congressional legislation and action thereunder, which was passed for the purpose of relieving burdens on the interstate operations of interstate common carriers.

8. Because the denials of your petitioner's motions to dismiss on jurisdictional grounds deny to your petitioner the rights given by sections 207 and 208 of the amended Judicial Code (U. S. Code Ann. title 28, secs. 41 (28), 46; 36 U. S. Stats. at Large 1148, and 38 U. S. Stats. at Large 219), although the inevitable effect of said denials and judgment is to limit the application of an order of the Interstate Commerce Commission, suspend the operation of the order as against the agreement sued on, and annul its effect to a certain extent.

9. Because the questions presented are federal questions of public importance and of general interest to the interstate railroads of the country, not heretofore determined by this court, which have been decided by the state courts of Massachusetts in a way not in accord with the law and applicable decisions of this court.

The petition for certiorari was granted January 22nd, 1929.*

II.

Brief Statement of Facts.

In June, 1921, the defendant, under sec. 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920, 41 U. S. Stats. at Large 474, filed its application "for a certificate of public convenience and necessity . . . permitting the abandonment of operation of its line between Feeding Hills, Massachusetts, and Agawam Junction, Massachusetts"

*The purpose of this certiorari is to review the judgment of the Superior Court, but the only questions of law which will be discussed in this brief are those properly falling within this court's jurisdiction.

(Original Exhibits, p. 12). The point where said line connected with the Boston & Albany Railroad was at a distance of approximately 1.87 miles from Feeding Hills.

1. On this application the report of the commission is in part as follows: The Central New England Railway Company "owns and operates about 300 miles of track in its entire system. Its trains enter Springfield, a city of more than 100,000 inhabitants, by using 4.05 miles of track of the Boston & Albany railroad. Under the trackage agreement the applicant is to pay the Boston & Albany railroad company $15,000 a year for *the right to operate* over this track not more than 3 freight trains of 30 cars each and 3 passenger trains daily. This agreement expires August 30, 1940. The applicant proposes to abandon about 1.87 miles of track extending from Agawam to its connection with the Boston & Albany. The traffic is very light over this line; it is handled in one mixed train a day for the present time and is not likely to increase in the near future. From Agawam an electric line runs directly into Springfield, hauling passengers and light freight. For the year 1920 the revenue derived from the line proposed to be abandoned was $2,686.04, and the operating expenses were $41,518.62, resulting in an operating loss of $38,832.58. Upon the facts presented we find that the present and future public convenience and necessity permit the abandonment of the line in question. A certificate to that effect will accordingly be issued."

2. On September 8, 1921, the commission issued a certificate of public convenience and necessity in the following form:

"Investigation of the matters and things involved in this proceeding have been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof: It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the

station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Massachusetts, as described in the application and report aforesaid; It is ordered, That said Central New England Railway Company, be and it is hereby, authorized to abandon said line of railroad; It is further ordered, That said Central New England Railway Company, when filing schedules canceling tariffs applicable to said line of railroad, shall in such schedules make specific reference to this certificate by title, date and dockets number."*

3. On November 9, 1921, the defendant sent the Boston & Albany Railroad Company a letter, which reads:

"Please take notice that this Company will discontinue operation of its lines north of Feeding Hills station, and between there and Agawam Junction, effective December 15, 1921. At said date this Company will cease to make use of the license and permission acquired by it by virtue of contract with your Company of October 25, 1899, and will discontinue payments thereunder as of said date. The above discontinuance of operation is by virtue of certificates of the Interstate Commerce Commission, Division 4, dated September 8, 1921, in the matter of application of the Central New England Railway Company for a certificate of public convenience and necessity, Finance Docket No. 1479. If any questions of detail arise in connection with the discontinuance, they may be taken up and settled by mutual agreement between representatives of the two Companies."**

4. The contract referred to in defendant's letter under date of November 9th, 1921 and its legal effect is stated as follows by the state court (record page 70):

> "Under the terms of the contract the defendant agreed to pay $15,000 per annum in return for the plaintiff's promise to 'license and permit . . . (it) to pass with trains . . . over the line of the (plaintiff's lessor).'

*Record, pp. 63, 64.

**Record, p. 64.

The agreement is free from ambiguity and indicates beyond a doubt that the annual payment was to be made irrespective of use. It was consideration paid for the right to use and not for the use, and as so construed it does not involve a forfeiture. If it be assumed that the agreement is in the nature of a license rather than an easement in gross, *Goldman* v. *Beach Front Realty Co.* 83 N. J. L. 97, 99, 100, or a trackage contract for a stated period, *Union Pacific Railway* v. *Chicago, Rock Island & Pacific Railway*, 163 U. S. 564, and has the usual characteristic of a license, namely revocability, it does not follow that the license can be revoked by either party with impunity.

We think the Central New England Railway Company under the terms of the agreement can be held liable for breach of contract. Williston, Contracts, vol. 1, sec. 493. *McCrea* v. *Marsh*, 12 *Gray*, 211. *King* v. *David Allen & Sons, Billposting, Ltd.* (1916) 2 A. C. 54. *Kerrison* v. *Smith* (1897) 2 Q. B. 445. *United Merchants' Health & Improvement Co.* v. *American Billposting Co.* 128 N. Y. Supp. 666, 667. The promise of the Boston & Albany Railroad Company was not, therefore, purely illusory. The case of *Whittemore* v. *New York, New Haven & Hartford Railroad*, 191 Mass. 392, is clearly distinguishable; there the term of the agreement, 'that whenever said first party may find it necessary for the accomodation of its business to remove said spur track,' no claim for damages shall be made, was the decisive factor. The lease by the Boston & Albany Railroad Company to the New York Central Railroad Company did not revoke the license. Under the terms of the lease of the defendant and the Boston & Albany Railroad Company the former assumed all the obligations of the latter. It is clear, therefore, that the Boston & Albany Railroad Company did not intend to revoke the license by the assignment. It is not open to serious doubt that under the terms of the agreement between the Boston & Albany Railroad Company and the Central New England Railway Company, the duties of the former could be delegated. The seventh paragraph of the agreement provides in part that 'in case of a breach of any of the stipulations to be observed on the part of the New England Company or of those claiming under it, and a continuance of such breach for thirty (30) days, or in case the rights

under this contract shall be taken from said New England Company or its successor or transferee . . . the Albany Company or its successors may, while the default or neglect continues, . . . without any notice or demand, terminate this contract . . .' See in this connection Williston, Contracts, vol. 1, sec. 423. The defendant admittedly paid a sum of money annually over a period of nineteen years to the plaintiff or to its predecessor, the New York Central & Hudson River Railroad Company. See *Boston & Albany Railroad* v. *New York Central Railroad*, 256 Mass. 600, 609. Such action on its part prevents it from now objecting to the assignment. *Nelson Theatre Co.* v. *Nelson*, 216 Mass. 30, 34. *Saxeney* v. *Panis*, 239 Mass. 207, 210."

III.

BRIEF OF THE ARGUMENT.

A.

The State Court Had Jurisdiction of the Subject Matter of the Case (Respondent's Original Brief, pp. 33-34).*

(a) The jurisdictional question involves a consideration of the federal statutes relative to the Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920, 41 Stat. at Large 456, 477, sec. 1, pars. 18 to 20 inclusive. Section 22 of the Act provides as follows:

> "*Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.*"

Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920, 41 Stat. at Large 456, 477, sec. 1, pars. 18 to 20, inclusive:

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, *and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.*
>
> "(19) *The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this*

*Inasmuch as the question of jurisdiction of the state court lies at the threshold it will for that reason, first be considered.

Act shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints of the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, *and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby.* Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Section 207 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1148, Act of June 18, 1910, c. 309, sec. 1; 36 Stat. 539, being United States Comp. Stat. 1916, sec. 993:

"The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

"*First.* All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"*Second.* Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"*Third.* Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

"*Fourth.* All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

"Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

"The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

Section 208 of the Judicial Code, Act of March 3, 1911, 36 Stat. 1148, Act of June 18, 1910, c. 309, sec. 1; 36 Stat. 539, being United States Comp. Stat. 1916, sec. 997:

"Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion,

may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit."

Act of October 22, 1913, c. 32, 38 U. S. Stat. at Large 219, being United States Comp. Stat. 1916, sec. 992:

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce Court and to amend the Act entitled' 'An Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed."

(*b*) Section 22, which has never been abrogated, was added at the end of the Interstate Commerce Act to preserve the jurisdiction of State Courts.

"But for this proviso to section 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts and this clause was added to indicate that the Commerce Act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction. *Galveston &c. R.R.* v. *Wallace*, 223 U. S. 481."

Penna. R.R. v. *Puritan Coal Co.*, 237 U. S. 129, 130.

In *Pennsylvania R.R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120, this court said at page 123:

> "Thus we have held that a manifest purpose of the provision in section 22 is to make it plain that such 'appropriate common law or statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced, *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447; that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R.R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 129; that the act does not supersede the jurisdiction of state courts in any case, new or old, *where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the federal courts is otherwise made exclusive, ibid,* 130."

(c) The action in this case lay in the state court because it was brought to enforce common law rights under a contract which was wholly unaffected by sections 18, 19 and 20 of the Transportation Act of February 28, 1920 and the right to bring such action has been specifically preserved to the respondent by section 22 of the Interstate Commerce Act. The precise administrative question decided by the Commission in this case was whether public necessity and convenience justified it in permitting the petitioner to abandon a portion of its road. Contractual rights were not involved. The Commission did not determine legal rights and obligations. It performed a purely administrative act. Later on in this brief, it will be argued that the Commission is without authority to determine legal rights and obligations; that under the provisions of the Transportation Act paragraphs 18 to 20 Congress did not authorize the Commission to sanction the abandonment by an interstate carrier of a contractual obligation such as existed between the parties in the case at bar with impunity. Howbeit, in mak-

ing the order in the instant case, the Commission performed purely an administrative function. A state court is not deprived of judicial powers over a subject because an administrative determination in the premises is provided for by the statute.* Where questions of law and not voluminous facts or discretionary administrative functions are involved, the courts may act without administrative determination. Ultimate review by the Federal Supreme Court secures uniformity of regulations and the supremacy of the authority of Congress.

Paragraph 18 of the Federal Transportation Act confers administrative authority upon the Interstate Commerce Commission to grant or refuse authority to abandon a part of an interstate railroad. This provision relates to a permissive remedy. It has no relation to contract rights or obligations.

> "The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule, or practice. It is the exercise of administrative judgment."
>
> *Texas & Pacific Rlwy.* v. *Gulf, etc. Rlwy.*, 270 U. S. 266, 373.

This is purely an action against the petitioner bottomed upon its failure to comply with its common law duty, and according to the decisions of this court respondent had the right to maintain this action under section 22 of the Interstate Commerce Act.

Vide: Eastern Railway v. *Littlefield*, 237 U. S. 140, 143.

It has been repeatedly held by this court that only those matters must first come before the Interstate Commerce Commission which involve administrative functions, such as rates, switching facilities, the rate of distribution of cars, and similar questions of practice; that the Commission did not first have to pass upon those questions which constituted a violation or denial of unquestioned legal duties of giving ser-

*State v. Atlantic Coast Line R. Co., 116 So. 48, decided Jan. 10, 1928.

vice as a common carrier *per se*. The Commission was given exclusive jurisdiction of administrative matters for the reason that therein *they were not deciding questions of law, or judicial questions, but questions of the reasonableness of rules, procedure, and business supervision* on which opinions might well differ; and therefore, to prevent contrary holdings on similar questions and to insure uniformity, the court holds the Commission's jurisdiction on such matters to be exclusive. To permit different courts or bodies to pass upon such questions might result in what one would hold reasonable on questions of rates, facilities, switching charges or car service, etc., another might hold unreasonable, thereby creating the discrimination that the act sought to avoid.

T. & P. R.R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

L. & N. Railroad Co. v. *F. W. Cook Brewing Co.*, 223 U. S., 70.

Penn R.R. Co. v. *Puritan Coal Mfg. Co.*, 237 U. S. 121.

Eastern R.R. Co. of New Mexico v. *Littlefield*, 237 U. S., 140.

Hartman "Procedure and Proof Before The Interstate Commerce Commission" (1925).

The fact that the Interstate Commerce Commission was authorized to make this administrative determination relative to abandonment of part of the petitioner's road did not preclude the state court from enforcing common law remedies.

New York Central & Hudson R.R. Co. v. *Gray*, 239 U. S. 583.

Great Northern Railway Co. v. *Merchants Elevator Co.*, 259 U. S. 285.

It would have been a vain and futile thing for respondent to resort to the Interstate Commerce Commission for the

purpose of enforcing its legal rights that grew out of petitioner's breach of contract. On the other hand, if the petitioner believed that the Interstate Commerce Commission intended to include within its order a determination of legal rights and obligations arising out of the trackage contract in question, it should have taken action, through appropriate application, to remove the doubt by securing an expression by that Commission of the intention so to do.*

(*d*) The respondent made no attack open or covert upon the Commission's order or certificate relative to abandonment. The action is not brought to enjoin, set aside, annul or suspend in whole or in part the order of the Interstate Commerce Commission. As previously stated the Commission did not determine legal rights and obligations which arose out of the contract in question, even assuming that it was empowered to do so. For that reason alone the state court could determine the rights of the parties by virtue of its general jurisdiction.

(*e*) That the state court had jurisdiction to construe the order of the Interstate Commission is clear under the following authorities:

Great Northern Railroad v. *Merchants Elevator Co.*, 259 U. S. 285, 295.

Texas & Pacific Rlwy. v. *Gulf etc., Rlwy.*, 270 U. S. 266, 273.

Timken Co. v. *Penna. R.R. Co.*, 274 U. S. 181.

There is nothing in the statutes relied upon by the petitioner which deprives the state court of jurisdiction to entertain an action of this kind even if its decision is subject to review, in the discretion of this court.

Vide: New York Central & Hudson River R.R. Co. v. *Gray*, 239 U. S. 583.

Vide: Arkansas Comm. v. *Chicago, etc. R.R.*, 274 U. S. 597, 603.

B.

The Amended Interstate Commerce Act and Certificate and Order of the Commission Issued Thereunder do not Protect the Petitioner in this Action. (Respondent's Original Brief, pp. 22-31).

1. (*a*) The provisions of the Transportation Act relative to abandonment show no Congressional purpose to relieve railroads from their obligations to their creditors or to take from the latter any remedial process provided by the laws of the state.

The underlying reasons responsible for the provisions in the Transportation Act respecting abandonment are well known.* In Congressional Record, 66th Congress, 1st Session, Vol. 8, pt. 8, p. 8316, there appears among others the following statement before the House when this Act was under consideration:

> "Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out of the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones, affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong."
>
> See: Vanderblue & Burgess' work upon railroads, p. 299.

*Excerpts from the Congressional record which are annexed to this brief marked "A" disclose some of the reasons for enacting these federal provisions.

Already attention has been called to Section 22 of the original Act which provides in part as follows:

> *"And nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."*

It is indisputable that the foregoing provision has not been repealed expressly or by implication by the Transportation Act of February 28, 1920. On the contrary, the above provision was in full force and effect when respondent's suit was brought in the state court. The Interstate Commerce Commission is authorized under paragraph 20 to make an administrative determination whether the present or future public convenience and necessity justify abandonment, but the enforcement by the state courts of common law or statutory remedies in case of disputed questions arising out of the legal effect of the Commission's permission to abandon is permissible under the provisions of the Act preserving existing remedies. State courts by virtue of their general jurisdiction can determine the rights of the parties where damages are claimed for failure to comply with contractual obligations notwithstanding that the Commisson has exercised an administrative judgment relative to abandonment. Under paragraph 20 of the Transportation Act, Congress has vested in the Commission authority to find the facts and thereon to exercise the necessary judgment.

> *Texas & Pacific Rlwy.* v. *Gulf, etc. Rlwy.*, 270 U. S. 266, 373.
> *Colorado* v. *United States* 271 U. S. 153, 166.

It was the purpose of Congress to entrust to the Commission only such matters affecting carriers as called for the judgment of a body of experts and all other matters being outside of the scope of the Commission's peculiar field are ordinarily left for the courts. It is difficult to reconcile any other theory with the principles that underlie the cases

defining the power of the Commission and the effect that must be given to its findings.*

Hence in determining whether public convenience and necessity permit of an abandonment the Commission exercises purely administrative judgment. The Interstate Commerce Commission is not a court. It has no judicial powers in the sense that it can adjudicate purely legal questions or rights arising out of contracts between carriers and third parties. When the Commission has exercised its administrative judgment and permitted an abandonment, the rights of a railroad and its creditors necessarily are to be determined by courts of general jurisdiction.**

In short when the Commission has discharged its administrative function relative to the propriety of permitting a railroad to abandon a portion of its road, it has wholly performed its statutory duty. For the Commission then to pass upon the rights of creditors or to adjust matters growing out of contractual obligations would be an usurpation of judicial power for its sole duty is to determine whether public interest and necessity justify it in permitting the railroad to abandon.

(*b*) Congress did not attempt to give to the Commission under paragraphs 18–20 judicial powers. By paragraph 20 it is provided that "the Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, *and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.*"

The words "and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require" relate to matters

*Vide: *United States* v. *Louis. & Nash. R.R.*, 235 U. S., 314, 320.

**Compare *Penn. R.R.* v. *Puritan R.R.*, 237 U. S. 121.

wholly unrelated to contractual rights of third parties. Public interest is not concerned with the rights of creditors after abandonment of a railroad has been sanctioned by the Commission. While the purpose of Congress was to put the railroad systems of the country "more completely than ever under the fostering guardianship and control of the Commission," Congress evidenced no intention to confer upon the latter the extraordinary right of terminating with impunity contractual obligations of third parties. Certainly it is not to be presumed that Congress intended to leave to the untrammeled discretion of an administrative body the power to take away vested rights.*

Paragraph 20 of the Transportation Act certainly cannot be construed to mean that under it the Commission may in their uncontrolled discretion take away contractual rights. Assuredly Congress has laid down no rule for the Commission's guidance in determining such important matters. Congress cannot delegate its power to make a law although it can make a law to delegate a power to determine some fact or state of facts upon which the law makes or intends to make its own action depend. Not having prescribed the rule or standard which is to control the Commission, necessarily the entire question would be left to its uncontrolled discretion which would be unconstitutional.

Vide: *Yick Wo* v. *Hopkins*, 118 U. S. 356, 359.
Comm. v. *Maletsky*, 203 Mass. 241.
Anzalone v. *Met. Comm.*, 257 Mass. 32, 37.

The purpose of paragraphs 18–20 is to permit railroads to abandon a portion of their roads where public convenience and necessity justify it, and to accomplish this the Commission is entrusted with the duty of investigating the facts and determining whether public convenience and necessity permit such abandonment.

---

*It is very doubtful whether Congress could so legislate. *Vide:* 37 Harv. L. Rev. p. 741.

(*c*) The Commission however has no power under paragraph 20 to determine in its administrative discretion that public convenience and necessity require the abrogation of contracts.

There is nothing in the purpose of the statute nor in its language that indicates an intention to exempt carriers from all liability on their contracts or to provide any machinery for dealing with such matters. Certainly there is nothing in the Transportation Act which expressly empowers the Commission to pass upon contractual obligations. The grant of such an extraordinary power is not to be implied for the power itself is so vast and comprehensive, so largely affecting the rights of persons that no just rule of construction would tolerate a grant of such power by mere implication.

See: *Marshall* v. *Gordon*, 243 U. S. 521, at page 541.

Vide: Interstate Commerce Commission v. *Railway Co.*, 167 U. S., 494, 495, 501, 505.

(*d*) If Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Incorporating into the Transportation Act the administrative duties relative to abandonment and other subjects and directing the Commission to execute and enforce the provisions of the Act do not by implication carry to the Commission or invest it with the power to exercise important judicial functions. To say that Congress gave to the Commission the right to impair or destroy legal rights under contracts is to build up indirectly and by implication a power which is not in terms granted. It is not to be supposed that Congress would ever authorize an administrative body to usurp judicial functions in such a manner and to evolve as it were out of its own consciousness the satisfactory solution of the difficult problem of administering distributive justice between railroads and their creditors or to relieve the former from their obligations to the latter. *If it had intended to*

grant such extraordinary power, it would have said so in unmistakable terms.

(c) If this Court decides that in enacting the Transportation Act Congress conferred the power upon the Commission to abrogate the contract in this suit, then the conclusions of the state court (Record, pp. 69, 70) are correct for reasons stated therein.*

The state court "assumed that Congress, in enacting the Interstate Commerce Act, section 1, paragraphs 18–20, as amended by 41 U. S. Stats. at Large 456, 477, 478, authorized the Commission to sanction the abandonment by an interstate carrier of a contractual obligation, such as existed between the parties in the case at bar, with impunity."** Upon the foregoing assumption *the state court decided that the Commission did not exercise the authority which it assumed it had, and held that the certificate of the Interstate Commerce Commission is not a defense to this action for the reason "that it does not appear by express words or by clear implication that the Commission intended to deprive the Boston & Albany Railroad Company . . . of its rights under the agreement. . . ."*

Irrespective of whether the provisions of federal law show Congressional purpose to confer upon the Interstate Commerce Commission the power by implication to abrogate contractual rights with impunity when they issue a certificate of convenience and necessity relative to abandonment, it is indisputable that such power was not exercised in the instant case.

II. It has been shown under "I" that Congress did not vest in the Commission the uncontrolled power to abrogate contractual rights when it issues its orders relative to abandonment. It is equally plain that the provisions of the Transportation Act relative to that subject show no Congressional purpose that the Commission's order should by force of the

*The attention of the court is particularly called to respondent's brief in opposition to the petition for certiorari at pages 17–22.

**Record, p. 67.

federal statutes relieve the railroad from its obligations to creditors. The purpose of paragraphs 18 to 21 of the Act relates to the construction, acquisition, extension and abandonment of a railroad. "They deal primarily with rights *sought to be exercised by the carrier.*"*

The purpose of those paragraphs respecting construction, acquisition and extension is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in public interest.** The provisions relative to abandonment are not mandatory. The certificate issued by the Commission under the Act is permissive only. Attention has been called to the situation which Congress intended to remedy in providing for abandonment.*** In this connection we direct your attention to what is said on pages 22 and 23 of our original brief in opposition to the petition for writ of certiorari.

> "Sometimes railroads could abandon their entire lines because they had become so unprofitable that to compel them to run trains was confiscatory. Sometimes their charter or contractual relations were such that they could abandon their roads only with the permission of the state or states under which they were organized. And sometimes their charters were subject to forfeiture or they were compelled through receivership proceedings to sell their roads to satisfy the claims of their creditors.
>
> "When Congress, after the close of Federal control taken during the war, sought 'affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country,' it deemed it wise to put an end to this heterogeneous control, and to put the protection of the public interests in the hands of the Inter-

*Cleveland etc. Ryway. v. U. S., 275 U. S. 408.

**Vide: Railroad Commission of Wisconsin v. Chic. & Burlington & Quincy R.R. Co., 257 U. S. 563; The Chicago Junction Case, 264 U. S. 258; Railroad Commission of California v. Southern Pacific Co., 264 U. S. 331; Texas & Pacific Ruy. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266; Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co., 271 U. S. 244.

***Vide: page 20 of this brief.

state Commerce Commission. In doing so it dealt not merely with the abandonment of roads, but also with their construction, giving to the Commission the power to decide in either case whether the proposed construction was required or the proposed abandonment permitted by public convenience and necessity. 'The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.' 'The sole test prescribed is that abandonment be consistent with public necessity and convenience.'

Colorado v. *United States*, 271 U. S. 153, 166, 168."

No railroad is required to apply to the Commission for action under the abandonment provisions. If it does so, its application is purely voluntary. The only mandatory feature about it is that the railroad cannot abandon without first obtaining a certificate of the Commission. This is prohibitory rather than mandatory. There is nothing in the Act which prevents a petitioner from postponing its action under the certificate or from failing to exercise the permission. Neither is there anything in the Act which prevents a railroad which has obtained permission to abandon a portion of its railroad, from thereafterwards securing the right to operate again.

The purpose of paragraphs 18 to 21 of Section 1 is not to compel abandonment in the interest of interstate commerce but to restrict it for the purpose of protecting the public interests against unreasonable abandonment. The certificate issued by the Commission under the Act is permissive only.* The legislation covers total and partial abandonment. In the instant case the petitioner chose to abandon on December 15, 1921 about three months after the certificate of the Interstate Commerce Commission had issued but there is nothing in the Act which prevented the petitioner from continuing to operate the road for a period of years and as previously stated, there is nothing in the Act which necessarily prevents a rail-

*Vide: *State* v. *Atlantic Coast Line Co.*, R. 116 Southern, 48, 53.

road from obtaining permission to again operate that part of its road which it has been permitted to abandon. Moreover, the Commission is empowered to permit total or partial abandonment for reasons unrelated to the question whether further operation will result in loss.

(*a*) The vice of petitioner's reasoning lies in the fact that it is imputing to Congress an intention which is not reasonably implied. Undoubtedly Congress had in mind, among other things, the effect upon interstate commerce due to further operation of an unprofitable road or a branch thereof and because of such burden it empowered the Commission to permit a railroad to abandon if the latter applied for permission to do so.

(*b*) *When abandonment takes place pursuant to the Commission's order, the burden upon interstate commerce which Congress had in mind has been removed. Congress did not concern itself with the legal rights of parties who might be affected by the abandonment.* The Act affords no protection in contractual matters either in the case of total or partial abandonment, and in testing the correctness of that statement the matter must be scrutinized from the standpoint of both total and partial abandonment. If the Act cannot be invoked as a defense to contractual rights in the former, it cannot be in the latter for it would be absurd to say that Congress intended that property rights should be injuriously affected in one case but not in another. The importance of this is manifest when petitioner's contentions in the instant inquiry are examined. Petitioner claims that interstate commerce would be burdened if it should be required to make payments under the contract or to respond in damages and consequently it is entitled to immunity. Suppose that this were not a case of partial abandonment but that of a total one, what becomes of contractual obligations in that event? Assuredly it could not be asserted that there interstate commerce was burdened because the road would be no longer in operation. If the carrier is to receive exemption in such a case as that, it would be because of reasons wholly unrelated

to interstate commerce. What is the criterion to be applied in this matter if it should be held that the federal Act permitting abandonment evinces a Congressional purpose to exempt a road from contractual obligations?

In determining whether Congress by implication intended to legislate relative to contractual rights, it is obvious that the nature of the same is wholly unimportant, *for it would be absurd to say that Congress had any intention of creating a preferential class of creditors in such a matter.* It would be equally absurd to say that Congress intended to make any distinction between executory and executed contracts. Congress certainly had no intention of favoring one class of creditors over another.

(*c*) Obligations arising out of mortgages, leases, trackage contracts, and claims for personal services all must be treated alike in the case of abandonment under the Act, unless there is to be attributed to Congress the purpose of providing a railroad a sort of civil sanctuary in the case of one class of debts and to refuse it in another. No such contention can be sound.

Reduced to its final analysis, the contention of the petitioner in this case is that the federal statutes relative to abandonment may be invoked to relieve carriers of the burdensome effect of all contracts as well as other possible liabilities.

In the petitioner's brief, p. 41, it is stated:

> "Recent decisions of the Interstate Commerce Commission showing the extent to which the Commission has acted under paragraphs 18 to 22 of Section 1 of the Transportation Act in relieving carriers of the burdensome obligations of special contracts are:
>
> *Central v. Hereford Rlwy.*, 99 I. C. C. 7.
>
> *Abandonment of Branch Line by N. Y., N. H., & H. R.R.*, 82 I. C. C. 45.

The second of these two cases is helpful because it shows (82 I. C. C. 46) that upon the issuance of a cer-

tificate of abandonment the carrier authorized would, by force of the statute, be relieved from burdensome obligations under mortgages."

(Italics are ours.)

The two cases cited are inapplicable and counsel's statement relative to the second one is incorrect.

At page 46 of 82 I. C. C. it is stated:

> "In 1918, the last year of operation, the total freight tonnage was 378 tons and the revenue from passenger traffic was $5.74. It is claimed that the decrease in traffic has been due principally to the use of motor trucks and automobiles. *The applicant represents that there is no apparent need for resumption of the service discontinued during the Federal control period and that it is desirable that the line be abandoned so that it may be relieved from the obligations under its existing mortgages to maintain the property in good operating condition.*"

Without inquiring too closely whether petitioner's counsel has not confused applicant's wishes in that case to be relieved from existing mortgages with the order which did not attempt to pass upon the question at all, it is obvious that the case does not support counsel's assertion.

(d) *Thus it appears from counsel's own admissions in this case that its contention is not confined to obligations arising out of trackage contracts but includes such burdensome obligations as mortgages. Indeed to be consistent, counsel had no other alternative. However much petitioner may intend to and try to ignore and avoid it, at times, the situation is clear that the principle involved in the present inquiry vitally affects contracts of every name and description. The question therefore is this: Do the provisions of the Transportation Act relative to abandonment show Congressional purpose to relieve railroads from their obligations to their creditors if the Commission issue a certificate permitting the abandonment of a road or a portion thereof?*

In the case of total abandonment, can it for a moment be seriously believed that Congress intended that a heavily

mortgaged railroad should gain complete immunity when the Commission's order issued, or that creditors with claims arising out of leases, trackage contracts, and contracts for personal services should be remediless by force of sections 18 to 21 of the Act? Exemption under the federal statutes certainly could not be invoked under the guise of protecting interstate commerce inasmuch as the road had manifested an intention to discontinue further operation. In the case of partial abandonment is it possible to read into the Act a Congressional purpose to make a distinction in the case of mortgages, leases and other contracts? Such a distinction as this seems fanciful. The petitioner, however, seeks to avoid these insurmountable obstacles by arguing that in the case of partial abandonment a road would be burdening interstate commerce if after the issuance of the Commission's order, it complied with its contractual obligations or was required to respond in damages resulting from its refusal to do so.

The burden upon interstate commerce however in the sense contemplated by Congress is removed when there is no further operation. The effect upon interstate commerce due to discharging its obligations may or may not be *even remote*. If petitioner's contention is sound, it would be immune from the payment of a hundred dollar indebtedness, notwithstanding that such a picayune matter could not possibly have any effect upon commerce. The fact that the amount is small or large cannot affect the inquiry in the slightest degree. Assuming, however, that the payment is a large one such as in the instant case in no aspect of the matter is interstate commerce injuriously affected in the sense that Congress had in mind when it enacted the Transportation Act. Mortgage and lease obligations as well as those arising under trackage contracts can have no effect upon interstate commerce except in the remotest degree. Petitioner cannot hunt with the hounds and run with the hares. The right which it exercised in this case was one which it availed itself of to relieve against (according to its assertions) an unprofitable

operation of a part of its road. While it is true that "the certificate issues not primarily to protect the railroad but to protect the interstate commerce from undue burdens or discrimination," nevertheless it would be sheerest nonsense for this petitioner to say that its purpose in exercising the right under paragraphs 18 to 20 of the Transportation Act was to relieve interstate commerce. *Its voluntary action really was to relieve itself from the consequences of an unprofitable venture. Hence in availing itself of the permission accorded under the Act it cannot take the position that it should be relieved from burdensome contracts after it has abandoned part of its road, upon the ground that otherwise interstate commerce would be injuriously affected.* Such solicitude is altogether too ingenuous.

To suit its purpose, the petitioner has assumed that the mere existence of a trackage agreement, the ability to use which has been cut off at least temporarily by a permissive order of the Interstate Commerce Commission to abandon a part of or all of one of its branches, creates a liability which it must by operation of law rid itself of or else the very purpose of the Act is defeated. We have already replied briefly to the argument. Now let us go one step further. It is conceivable that a petitioner in a similar situation might, to reduce its present expense, petition the Commission to authorize it to abandon a part or all of its line connecting with the tracks of another road over which under the agreement it had the right to operate its trains. There might be a great future in that territory so that the petitioner might believe that it was a great benefit to keep alive the trackage agreement by making the payments due thereunder even though it operated no trains, so that with future development it would have an access to that territory, while if it abandoned altogether the agreement it might not be able to negotiate another such favorable one. The directors might well believe it was a valuable asset for future business which should be retained, but that operation of trains over its branch line to the connection should be abandoned until the

development warranted renewing operations thereover. Before it could abandon the operation of trains to the connection it would have to obtain a certificate from the Commission, the legal effect of which, according to the petitioner, would be to terminate once and for all that agreement, thus depriving the company of a very valuable asset. This would result in the judgment of the Commission being substituted for and forced unwillingly upon the directors. And it is conceivable that the order might be made with as little examination of the agreement and as slight consideration of the rights of the parties thereto as appeared in the instant case. Surely Congress intended no such result.

Another interesting question arises. Assuming that the petitioner is correct, when does the contractual obligation become void? Is it when the order of the Interstate Commerce Commission issues, or only at such time as the petitioner chooses to exercise it? If the former, then the petitioner could have been prevented at once from operating over the Boston & Albany, unless it so happens that the petitioner could avail itself of the benefits of the order but the respondent could not. If the latter is the correct view, then the Boston & Albany is subject to the whim of the Central New England Railway Company, which may or may not abandon promptly. In other words, the petitioner in such a case has full control over the enforcement of the law.

If a railroad can be relieved of its obligations by the issuance of a certificate permitting it to abandon a part of its road, then Section 22 of the Act (which has not been modified) preserving existing remedies is but an idle form. To imagine that a railroad can receive a white-washing of all its obligations by securing a certificate of abandonment is pure nonsense. The contention of the petitioner rests upon the shakiest hypothesis, because interstate commerce is not burdened in any direct sense by its contractual obligations notwithstanding originally *it may have been by the operation of its road*, for inasmuch as it has ceased to operate *the burden has been removed.* When that is considered, the storm

of emotionalism created by petitioner respecting interstate commerce and the fostering guardianship of the Commission is entirely swept away, and the stark fact remains that after all the petitioner is seeking to avoid its obligations for the purpose of benefiting itself and not commerce.

Petitioner is unduly exercised over the effect of contractual obligations upon interstate commerce. Whether an abandoning road that complies with its contractual obligations may find the same a drain upon its resources, necessarily depends upon the character of the obligation and the extent of its resources. The matter is wholly conjectural. Moreover, it is pure guesswork whether any drain upon a carriers resources will even remotely affect interstate commerce.

(e) *It would be futile to pretend that Congress intended a rich and powerful carrier who chose to abandon a part of its road to be relieved of its obligations to creditors under the Interstate Commerce Act as amended or intended to have the Courts draw any distinction between prosperous and weak roads in determining what class of creditors and what kind of contracts should be injuriously affected by the Act.*

The propriety of permitting a railroad to abandon (which is left entirely to the administrative judgment of the Commission), presents an entirely different question than in the case of interfering with contractual rights of creditors after abandonment has taken place, because in the latter there is no satisfactory way of discerning whether the payment of an indebtedness is a drain upon the road's resources, or whether its extinguishment is in the interest of commerce.

(f) In consequence of these many problematical matters, it is indisputable that Congress had no intention of permitting an abandoning road to escape its contractual obligations. By what twist of the brain is it possible to evolve the notion that interstate commerce will be benefited if the respondent in the instant case should be required to pay over to the petitioner the amount of the judgment? If creditors' rights in the case of abandonment of a railroad are to be determined according to their burdensome effect upon inter-

state commerce there would be utter chaos in the courts resulting from the extreme difficulty of determining what contracts may be said to be burdensome upon commerce and what class of creditors are to be affected.

In the case of total abandonment interstate commerce is in no wise affected by any theory whatsoever. Where partial abandonment has been permitted no direct* interference with interstate commerce can arise where a railroad is forced to do no more than to pay its honest debts. It is a far cry indeed to say that the payment of the judgment in this case is such a drain upon the railroad as to constitute a burden upon interstate commerce.** This court has sustained the exercise of the state police power relative to the elimination of grade crossings. *Such legislation sometimes imposes staggering financial burdens upon the railroads, which in the case of weaker lines engaged in commerce might even result in their bankruptcy. The court has held that even the prospect of bankruptcy of an interstate carrier is not sufficient to invalidate state legislation requiring it to expend its funds for the elimination of grade crossings.*

Erie R.R. v. *Public Utility Commissioners*, 254 U. S. 394.

Lehigh Valley R. Co. v. *Board of Public Utility Commissioners*, 49 Supreme Court 69, decided November 19, 1928.

Vide: Board of Hudson River Regulating District v. *Fonda*, 249 N. Y. 445, decided December 31, 1928.

It is clear therefore that where there is abandonment the rights of railroad creditors are not injuriously affected by force of paragraphs 18 to 20 of the Transportation Act.***

Vide: Shafer v. *Farmers Grain Co.* (1925) 268 U. S.—189, 199.

**Certainly there is nothing in the record to justify such an absurd assumption.

***It is too plain for argument that respondent is a creditor. "The word 'creditor' is ordinarily used as an antonym of 'debtor' and involves a debt and a credit. It commonly signifies one who holds some contractual obligation against another." *Boston* v. *Turner*, 201 Mass., 190, 193.

The judgment in this case does not conflict with the provisions of federal laws or orders, nor does it burden interstate commerce.

In a case before this court* the contention was made that the provisions of federal law requiring railroads to provide continuous interstate transportation over connecting lines are violated by the enforcement of provisions of a state law permitting the attachment of cars owned by an interstate carrier in a suit brought by its creditor. It was claimed (page 176) that "to permit the instrumentalities used in the interchange of traffic by railway common carriers to be seized on process from various state courts does directly burden and impede interstate traffic within the inhibition of the acts of Congress." The court, however, sustained the attachment and stated that the provisions of federal law showed no Congressional purpose to relieve railroads from their obligations to their creditors. At page 178 the court said:

> "The Interstate Commerce Law therefore is directed against the acts of railroad companies which may prevent continuity of transportation. Section 5258 of the Revised Statutes was directed against the trammels of state enactments then existing or which might be attempted. In neither can there be discerned a purpose to relieve the railroads from any obligations to their creditors or take from their creditors any remedial process provided by Federal law as well."

III. There is no useful analogy between this case and the rate cases upon which the petitioner places so much reliance.

(*a*) Rates are clearly mandatory, and do not depend upon their acceptance by the railroads.

(*b*) Some of their features are expressly fixed by statute, and contracts in conflict therewith are made unlawful.

(*c*) This Court has never shown any disposition to deprive parties, even in those cases, of any remedy when justice seemed to require one.

---

*Davis v. C. C. C. & St. L. Ry., 217 U. S., 157.

Louisville & Nashville R. Co. v. *Mottley*, 219 U. S. 467, often cited as sustaining the petitioner's contention, merely denies the right of specific performance and declines to consider whether the plaintiff had some other remedy.

In *New York Central & Hudson River Railroad Co.* v. *Gray*, 239 U. S. 583, where Gray had received a contract for transportation in part payment for his services as an architect, which contract the railroad was prohibited from performing by the Hepburn Act, it was not only held that he was entitled to recover, but that his action was properly brought in the state court (the City Court of New York), this Court saying that in permitting recovery the state court "was simply administering the applicable principles of state law, and did not run counter to the Act of Congress."

In *Ortega Co.* v. *Triay*, 260 U. S. 103, a suit to enjoin a receiver from collecting rates on an electric railroad in excess of those fixed by contract, it was held that the injunction was properly denied, but the Court further said: "Necessarily, therefore, we affirm the action of the District Court, but while this denies the relief the Ortega Company prays against the appellee, we do not wish to be understood as adjudging that the company may not be entitled to some remedy for the non-observance of the contract of the Tacoma Company. See *Louisville & N. R. Co.* v. *Crouch*, 156 Ky. 27; 160 S. W. 750."

For other cases in which it was intimated that a refusal of specific performance was not to be regarded as a denial of any other remedy, we refer to the following:

Armour & Co. v. *Dallas*, 255 U. S. 280, 286.

Beasley v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 496, 497.

Louisville & N. R. Co. v. *Johnson, Admx.*, 207 Ky. 813.

Louisville & N. R. Co. v. *Letcher County C. & I. Co.*, 243 S. W. 45.

C.

The agreement of October 25, 1899, between the petitioner and the respondent is a trackage contract for a stated period, which is not terminable at will, and under its terms the annual payments, which were in consideration of the right to use the trackage facilities of the respondent, were to be made irrespective of the petitioner's use therof, and such payments were not excused by the petitioner's voluntary conduct in obtaining permission to abandon a part of its line the operation of which was necessary to the continued use of the trackage facilities of the respondent (Respondent's original brief, pp. 31-33).

(a) The agreement is a trackage agreement not terminable at the will of either party.

There is no question that the trackage agreement was not a revocable license. If there ever was any substantial question on this point, it is not here open to the petitioner (1) because this was a Massachusetts contract made and to be performed in that state and its construction involves no federal question; (2) because the petition for certiorari presents no such question, and (3) because the validity of the contract and its performance by the respondent and its assigns are conceded in the stipulation of the parties. (Record, p. 81).

The federal questions raised by the petition for certiorari already have been referred to.* It appears therefrom that the federal questions raised relate solely to the state court's jurisdiction of the subject matter of the case, and to the legal effect of the certificate and order of the Interstate Commerce Commission.

Throughout the petition for writ of certiorari and accompanying briefs, petitioner makes no claim that the agreement sued upon was a revocable license. On the contrary petitioner consistently treats this agreement as a valid contract for a definite stated period. Moreover it is provided in the stipulation (Record, page 81) "that said petition does not

*Vide: page 5 of this brief

present and is not intended to present any question as to the legal execution and validity of the contract in suit except as it may be claimed to have been affected by the order of the Interstate Commerce Commission issued September 8, 1921."

The agreement was to be performed wholly in the state of Massachusetts, and its construction affects a purely local question on which the state should have its own way.* Inasmuch as the interpretation of the contract in this case has no rational relationship to the federal questions presented upon this certiorari proceeding, a different construction by this court from that given to the contract by the state court would introduce into the jurisprudence of the state of Massachusetts the discordant elements of a substantial right which is protected in one set of courts and denied in the other. If, nevertheless, this court reserves the right to construe the contract itself because of the nature of the questions raised, as in *Railroad Commissioners of Texas* v. *Eastern Texas R.R.*, 264 U. S. 79, and because the court feels free to exercise its own independent judgment in determining questions of general law,** we submit that the conclusion reached by the state court is correct, and that it was an agreement binding upon both parties up to August 30, 1940, unless of course the federal questions raised by the petitioner are applicable and determinative of the matter.

Even if the court should feel inclined to construe the contract in question "*for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.*"***

The admissions of the petitioner in its brief in support of the petition for writ of certiorari clearly demonstrate that the contract was a permanent and irrevocable one. At page 9, it said:

---

*Vide: *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U. S. at p. 535; 37 Harvard Law Review 49, at pp. 81-88.

**Vide: *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U. S. at p. 530.

***Sim v. *Edenborn*, 242 U. S. 131, 135.

"This contract was executed as a result of a previous agreement, dated May 9, 1898 (Exhibit 28), between The Boston & Albany Railroad Company, the Philadelphia, Reading & New England Railroad Company, its reorganization committee, and The Hartford & Connecticut Western Railroad Company. This earlier agreement contemplated the organization of your petitioner and the construction of a branch line to connect with the lines of The Boston & Albany upon the location and construction of which your petitioner and The Boston & Albany Railroad Company were to make the contract sued on. The branch line was to be constructed from the south through Feeding Hills, Connecticut, to a point of connection on The Boston & Albany known as Agawam Junction, a distance of four miles from the City of Springfield. The petitioner was to run its trains into Springfield over the tracks of The Boston & Albany under the license provided for by the contract sued on. The branch line was to be the only physical connection between the rails of the petitioner and those of The Boston & Albany. The only way that the petitioner could use The Boston & Albany tracks covered by the contract was by coming from the south through Feeding Hills over this new branch line.

"Within a month after the execution of the second contract (Exhibit 3) The Boston & Albany Railroad had been leased, by Exhibit 1, to the corporate predecessor of the New York Central Railroad Company.

The branch line was completed in 1902 and was operated for approximately nineteen years, until revenue and expenses for the operation from Feeding Hills into Springfield showed a loss for the year 1920 alone of $38,812.58 (Exhibit 32)."

It would seem to be absurd in the face of the foregoing admissions to argue that under the circumstances which the petitioner says accompanied the making of this agreement, either the petitioner or respondent could have terminated it at will. What would the petitioner have said if, after the construction of the branch railroad and the opening of the same for passage of trains, the Boston & Albany Railroad Company had given notice that it would not permit it to use its tracks? Its disappointment would have been complete

and justly so, for it had relied upon the contract as the means of promoting its enterprise.* The provisions of the contract clearly reveal that the contracting parties contemplated an enforceable agreement of a permanent character entirely inconsistent with a revocable license. The first clause shows that the parties contemplated the contract to continue until the thirtieth day of August, 1940, which it so happens is the date of the expiration of its lease of The Hartford & Connecticut Western Railroad under the terms of which it operates trains between Feeding Hills and Agawam. This clearly refutes the notion that it could be terminated by either party upon notice. It is true that the agreement does not contain definite language relative to the petitioner's obligation to avail itself of the rights thereunder during the stated period but the only reasonable construction which can be given is that the parties intended the agreement to be of a permanent character and not terminable at will, but co-extensive with the expiration of The Hartford & Connecticut Western Railroad lease.

It is of no consequence what exact phrase should be given to the agreement for it is not upon the use of any description that the rights of the parties in any way depend. What it was styled by the parties does not determine its character or their legal relations. Contracts of a similar nature frequently have been construed by American and English courts. The Federal Supreme Court on many occasions has termed an agreement of this kind as being a contract for trackage rights rather than a lease.

In *Union Pacific Rlwy. Co.* v. *Chicago, etc., Rlwy. Co.*, 163 U. S. 564, Mr. Chief Justice Fuller speaking for the Court at page 582 said:

> "Taking up the contract with the Rock Island Company, what is the nature of the undertaking of the Pacific Company? In several places in this instrument it is called a 'lease' and the parties are called 'lessor' and

*Vide: *M'Neil* v. *Chesapeake & O. Ry. Co.*, 175 F.2d. 321, 330.

'lessee'; while, on the other hand, in the record of the proceedings of the executive committee of the Pacific Company and of its stockholders, it is called an agreement 'granting trackage rights' between Council Bluffs and South Omaha. But what it was styled by the parties does not determine its character or their legal relations, and in its interpretation the rule applies that 'the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject matter of the contract and the circumstances under which it was signed.' *Rock Island Railway Company* v. *Rio Grande Railway Co.*, 143 U. S. 596, 609.

"The contract in this regard was really an agreement for trackage rights, for running arrangements, a 'terminal contract' with compensation on a 'mileage' or 'wheelage basis,' rather than a lease."

See: 1 *Elliott on Railroads* (3rd edition) at page 750.

The English courts in construing contracts of a similar nature sometimes have referred to them as "licenses" of a permanent character. It is obvious that the reluctance shown by judges to use the word "license" in its ordinary sense grew out of the fact that the courts held that the contracts which were considered by them were not of a revocable nature, notwithstanding that in many instances there were no words fixing the duration of the agreement.

Vide: *Great Northern Railway Co.* v. *Manchester, Sheffield, etc., Rlwy. Co.*, 5 De Gex & Sm. 138.

Llanelly Ry. & Dock Co. v. *London & N. W. Ry. Co.*, L. R. 8 Ch. App. 942.

King v. *David Allen & Sons Bill Posting Ltd.*, 2, Appealed Cases, 1916, 54, at page 59.

As previously stated, contracts similar to the one in this action have been declared irrevocable by the Federal Supreme Court.

Vide: *Joy* v. *St. Louis*, 138 U. S. 1.

Union Pacific Railway Co. v. *Chicago, etc., Railway Co.*, 163 U. S. 564.

Texas & P. R. Co. v. Louisiana Public Service Commission, 12 F. (2nd) 798.
Western Union Telegraph Co. v. G. R. & Banking Company, 227 Fed. 276.
Franklin Tel. Co. v. Harrison, 145 U. S. 459.

Even if the agreement in question is to be construed as a license, it is not a naked one which is revocable at the pleasure of either party. The great weight of authority is to the effect that under most circumstances a naked license may be revoked at the pleasure of the licensor, but an executed license for a term and for a consideration cannot be revoked.

Vide: R. H. White Co. v. Remick & Co., 198 Mass. 41.
King v. Allen & Sons Bill Posting Ltd. (1916) 2 Appealed Cases, 54.
10 A. L. R. 1110.*
United Merchants R. I. Co. v. American B. Co., 128 N. Y. Supp. 666.

It is significant to note that in the questionnaire to the Central New England Railway Company by the Interstate Commerce Commission,** Mr. Bardo, President of the defendant railroad, used the following language:

"On August 25th, 1899, the Central New England Railway Company *entered into a contract* with the Boston and Albany Railroad Company supplemental to the contract of May 9th, 1898, but for the same term; namely, August 30th, 1940, providing for joint facilities and trackage rights between Agawam and Springfield, this contract providing that the Central New England Railway Company shall pay to the Boston and Albany Railroad Company $15,000.00 per annum, payable quarterly, if not more than three freight trains of thirty cars each in each direction shall be run and not more than three passenger trains in each direction, whatever number above this shall be run, the rental shall be increased in

*Note contains numerous instances of irrevocable licenses.

**Vide: page 15 "Original Exhibits."

proportion to the increase of traffic. *This agreement is in force at this date.*"

Nothing is stated in the questionnaire which even suggests that such contract was a mere revocable license.

(*b*) The state court properly ruled* that the agreement "*indicates that the annual payment was to be made irrespective of use. It was consideration paid for the right to use and not for the use, and as so construed it does not involve a forfeiture.*" (Italics are ours).

(*c*) When the contract was executed October 25, 1899 by its terms the Boston & Albany Railroad Company gave to the Central New England Railway Company the right to use its tracks until August 30, 1940. The right therefore on that date for the period stated had been unconditionally transferred to the other road for a certain definite amount of money. It makes no difference whether the consideration for obtaining that right was to be paid by instalments during the term or was a sum in gross, because the fact remains that the right to use the tracks had been given to the Central New England Railway Company from October 25, 1899 to August 30, 1940 and hence the Boston & Albany Railroad Company and its assignee could not be affected by what took place afterwards.

(*d*) *The consideration was for the right to use and not for the use. If the Central New England Railway Company did not see fit to avail itself of its right or voluntarily placed itself in a position where such right would be unavailable, nevertheless its obligation to make the payments is unaffected thereby.* The contention of petitioner that its obligation to pay "was not general but distinctly limited to the existence of that branch,"** is untenable.

(*e*) *Vested rights took place when the bargain was made. The subsequent conduct of petitioner in applying for permission to abandon, cannot prevent a recovery of what was stipu-*

*Record, p. 70.

**Petitioner's final brief, p. 41.

lated upon October 25, 1899. It does not lie in petitioner's mouth to contend that it is to be excused from its obligation to pay because it has received permission to abandon. Petitioner's failure to exercise its right to use the tracks did not result from operation of law. It was the direct result of its own conduct in availing itself of its rights under the Transportation Act. Petitioner for reasons personal to itself exercised those rights and received permission to abandon a portion of its road and after receiving the permissive certificate, it ceased operations and since then has not chosen to avail itself of its rights under the agreement of October 25, 1899. As previously shown the Act is permissive, not mandatory. With reference to abandonment, under paragraphs 18 to 20 it is left wholly optional with the carrier whether it will exercise the right to apply for permission to abandon.

(*f*) The court is not concerned in this case with a situation where performance of a contract has been rendered impossible by an act of Congress passed after the contract was made. Under the provisions of the Transportation Act, Congress did not make any provisions for compulsory abandonment. The situation in the instant inquiry, briefly summerized, is this. After making the contract sued upon, petitioner desired to cease operating a portion of its road and pursuant to the provisions of the Transportation Act it secured permission to do so. It now claims that because the rights transferred to it to use the tracks of the respondent's road are no longer necessary, it may breach its contract of October 25, 1899 upon the ground that the latter was executed upon the implied understanding that it should use the tracks from October 25, 1899 to August 30, 1940. Such a claim wholly ignores the character of the agreement. Moreover such claim is not well founded in law. In *Osborne* v. *Nicholson*, 13 Wall. 654, this court said at page 659:

> "But we think the exact point here under consideration was settled by the Court of Queen's Bench in *Mittelholzer* v. *Fullarton*. That case so far as it is necessary to state it was this: The contract was made at Barbice, in British

Guiana. The plaintiff sold to the defendant the services of one hundred and fifty-three apprentice laborers who had been slaves, for £7,800, *payable in six annual instalments of £1,300 each*. The defendant paid four instalments. The apprentices were then declared free by the local governor and council. The defendant refused to pay the two last instalments. The suit was brought to recover them. The court held that the plaintiff was entitled to judgment, 'though the legislature had determined the apprenticeship before they became due.'"

Vide: Grimsdick v. *Sweetman*, King's Bench Division (1909) 2, p. 740.

Halsey v. *Lowenfeld*, King's Bench Division (1916) 2, p. 707.

If it can be said that the rules relating to impossibility of performance resulting from operation of law have any application in the instant case (which respondent denies) it is indisputable that the petitioner created such impossibility of performance by applying to the Interstate Commerce Commission for permission to abandon that part of its road covered by the contract. It is fundamental that impossibility arising from the promisor's own act is not in any case an excuse for non-performance of his contract.

The Laws of England (Earl of Halsbury) Vol. 7, p. 432.

As stated by the state court in *Proctor* v. *Union Coal Co.*, 243 Mass. 428, 432, "undoubtedly the defendant had a legal right to sell the land and ice-houses. But if it exercised that right and thereby deprived itself of the means of supplying ice in accordance with its contract, to the plaintiff's prejudice it became responsible in damages."

Performance of the contract sued upon has not been rendered unlawful in the sense that term has been used by courts.

(g) Impossibility of performance is not the result of any prohibitory regulation upon the part of the Interstate Commerce Commission but is solely due, if at all, to the voluntary act of the petitioner in applying to that body for permission to discontinue a part of its road.

As previously shown there is nothing contained in the provisions of the Transportation Act which justifies any inference that because permission may be given to a carrier to abandon its road the railroad may thereupon repudiate its contractual obligations. It is wholly unimportant that the abandonment in this case has made petitioner's right to use the tracks unavailable, because petitioner itself has created that situation. In bankruptcy, insolvency, and receivership matters frequently the claim has been made that performance of contracts is excusable, but neither bankruptcy nor insolvency constitute a legal excuse for the nonperformance of a contract.

Vide: Central Trust Co. v. *Chicago, Auditorium Co.*, 240 U. S. 581.

City of Montpelier v. *National Surety Co.*, 97 Vt., 111.

Isaac M'Lean Sons Co. v. *William S. Butler & Co.*, 227 Fed. Rep. 325.

Lewis v. *Atlas Mutual Life Ins. Co.*, 61 Mo. 534.

If petitioner finds the right to use trackage facilities under the contract unavailable it is wholly due to a cause for which it is responsible and as in the case of the dissolution or receivership of corporations, it should not be exempted from its contractual obligations.

Vide: Williston, Contracts (1920) Section 1960.

Stanton v. *N. Y. & Eastern R.R. Co.*, 59 Conn. 272, 287.

Re Companies' Acts, 117 Law Times 60 (Eng. Ch. D.)

Inchbald v. *Western Coffee Plantation Co.*, 17 C. B. N. S. 733.

(*b*) When this contract was executed it reasonably was within the contemplation of the parties that before 1940 (the period of termination) the petitioner might have wished or even been required to abandon a part of its road. They could have made provisions for a dispensation respecting perform-

ance. Their failure to do so is strongly indicative of their intention.

Vide: United States v. *Gleason*, 175 U. S. 588, 602.
Carnegie Steel Co. v. *United States*, 240 U. S. 156, 164, 165.
Day v. *United States*, 245 U. S. 159.
Columbus Rlwy. & Power Co. v. *Columbus*, 249 U. S. 399, 412.

In *Day* v. *United States*, supra, the Court said:

> "One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. *The Kronprinzessin Cecilie*, 244 U. S. 12, 22. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent."

It would be absurd to assert that the possibility of abandonment of a portion of its road by the Central New England Railway Company was unforeseeable when the contract was made. If, therefore, such a contingency was not provided for in the contract itself, the petitioner legally is not excused from performing particularly in view of the fact that it voluntarily created a situation which it claims makes the contract impossible to perform.

Vide: Rowe v. *Peabody*, 207 Mass. 226, 232.

(4) It is also plain that the facts in this case clearly exclude any application of the questionable English doctrine that frustration of the commercial adventure brings the contract to an end.

Vide: 40 Harvard Law Review, 305.
American Touring, etc. Co. v. *Baker Whitely Coal Co.*, 117 Maryland, 660.

(j) In the instant case petitioner can derive no assistance whatever from that doctrine because it is clear that its own voluntary conduct was responsible for the changed conditions which it refers to.

The petitioner appears to contend that the fact, if it be a fact, that the Commission figured the $15,000 annual payment as an operating expense is conclusive. We submit that such a finding is of little if any importance in the consideration of this Court, which may determine the character of the charge without reference to the Commission's finding.

Texas & Pacific Ry. Co. v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S., 266, 277.

The motive which actuated the petitioner to discontinue operating a portion of its road is immaterial. It is unimportant whether it applied for permission to abandon upon the ostensible reasons stated in its application or whether the New York, New Haven & Hartford Railroad Company was in fact the *Deus ex machina* in this matter. It is not relieved from its contractual obligations merely because of the informal proceedings before the Interstate Commerce Commission.

Judgment of the state court should be affirmed.

Respectfully submitted,

LOWELL A. MAYBERRY,
Attorney for respondent.

George H. Fernald, Jr.
Of Counsel.

APPENDIX

"A"

(Congressional Record. 66th Congress, 1st Session)
(Vol. 58, pt. 8, p. 8316)

House.—November 11, 1919.

Mr. Esch. We also give the commission the right of treating each emergency as it arises and of also distributing cars and locomotives in order to meet such emergency. With these powers granted and duly exercised we think many of the evils from which the country has suffered in years past may in a large degree be eliminated.

In section 402 we treat of extensions and abandonments. We believe one main cause of the so-called "weak sister" has been the unrestricted right of railroads to be built wherever their projectors thought fit. As a result of this unrestricted right we find in all States of the Union cases where, after a road has been built and long maintained and has gotten its traffic well established, another road puts in a parallel line with the usual result that instead of having one strong road doing the traffic we have two weak roads, as they have to charge the same rate between competitive points, and we burden the public by compelling it to sustain two weak roads when one strong road would have been sufficient.

How does this bill stop that? In this way: Before a road or an extension thereof can be built it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the building of a single rod of the extension or of the new line. That means that the commission must first investigate the situation. It must first consult the communities that would be connected or would be located on the proposed line. It must consult the shipping interests and producing interests and all other interests that might be involved and then determine whether or not it should issue a certificate of convenience and necessity.

This is not a new law. Several of the States have this same kind of law now, notably the State of New York and the State of Wisconsin and other states, and the law has worked successfully. It has prevented the construction of new lines that could not by any possibility have any hope of meeting operating expenses, not to say anything about profits. It would prevent the construction of some of these short lines which may have no hope of ultimate financial success. In every way we have felt that this provision would lessen the number of "weak sisters," would prevent the creation of any new ones, and would strengthen the existing lines. We can get better service by strengthening the existing line than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments. We have also provided for abandonments.

Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out of the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones, affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong.

(Congressional Record. 66th Congress, 1st Session)
(Vol. 58, pts. 1–9. p. 8534.)

House.—November 14, 1919

Mr. Venable. Is it not a fact that there are very few roads that are not engaged in interstate commerce?

Mr. Barkley. Certainly; and they are subject to this act. But if there is to be any authority to put a check on abandonment by railroads subject to this act, regardless of whether or not they are built wholly within the confines of a State, it should rest with the commission. Being engaged in interstate commerce, and thereby subject to the act, that right ought to be conferred on the Interstate Comerce Commission. If the House desires to legislate to the effect that there is never more to be any abandonment of railroads, then the amendment of the gentleman from Missouri should be adopted, because that would be the effect of his amendment.

Mr. MacGregor. Mr. Chairman, will the gentleman yield?

Mr. Barkley. Yes.

Mr. MacGregor. Who is to pay for the operation of railroads if they do not earn enough to keep them going?

Mr. Barkley. I do not know who is going to pay for it. I do not know whether anybody will or not. The object of this provision is to allow the Interstate Commerce Commission to investigate the propriety of abandonment, to investigate whether the abandonment would be in the interest of the public, and to issue a certificate of public convenience and advantage only in cases where it is shown to the commission that the railroads subject to the act or in the interest of the public shall be permitted to abandon some portion of their line, we certainly can trust the Interstate Commerce Commission to take care of the interests of the public. But if we accept the amendment of the gentleman from Missouri (Mr. Dickinson) we accept the idea that no new right of abandonment shall be acquired under the act.

Mr. Bee. Mr. Chairman, will the gentleman yield?

Mr. Barkley. Yes.

Mr. Bee. Does the gentleman from Kentucky think that where a road has secured the right of eminent domain, and right-of-way rights, and has built towns and villages, and homes have been built on the strength of it, they ought to be in a position to abandon, like the Frisco, because it does not pay dividends, a line that it has purchased?

Mr. Barkley. No, because they are being abandoned now, and nobody has the right to say they shall not be abandoned.

Mr. Bee. Have not the State commissions the right to prevent such abandonment?

Mr. Barkley. In some States the commissions have the right; but, taking the country at large, I do not think more than half a dozen States all together have a law concerning abandonment.

Mr. Scott. Mr. Chairman, will the gentleman yield?

Mr. Barkley. Yes.

Mr. Scott. If I understood the phraseology of the gentleman's amendment, I think it will accomplish just the opposite of what he intends to accomplish. It precludes the future abandonment, in any event, and instead of accomplishing the object intended, it will do the reverse.

Mr. Barkley. He seeks to cut off any new right of abandonment in the future. Possibly no rights of abandonment have accrued now, although rights of abandonment accrue only if the Interstate Commerce Commission, after investigation, certifies it will be in the interest of the public. If the gentleman's amendment is adopted it will accomplish the opposite purpose from what he intends.